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8 **IN THE SUPREME COURT**  
9 **STATE OF ARIZONA**

10 IN THE MATTER OF:

Supreme Court No. R-09-0012

11 PETITION TO AMEND RULE  
12 92(a)(1) OF THE RULES OF THE  
13 SUPREME COURT OF ARIZONA

**Comment of the State Bar of Arizona  
Regarding Petition to Amend Rule  
92(a)(1) of the Rules of the Supreme  
Court of Arizona**

14 The petitioner asks this Court to amend Rule 92(a)(1) of the Rules of the Supreme  
15 Court to require the presiding judge in each county to “create a randomized case  
16 assignment system within each judicial division for all cases in which a judge has not  
17 previously been involved....” Simply put, the issue is whether the power of a presiding  
18 judge to assign cases as he or she deems necessary or expedient should be abolished and  
19 replaced with an inflexible case assignment system requiring random assignment in all  
20 cases. The State Bar of Arizona, for reasons set forth below, does not believe this is a  
21 wise or necessary change, and, as such, opposes the proposed rule change.

22 **Is There a Need for a Rule Change?**

23 After this petition was filed, one of the State Bar’s standing committees solicited  
24 views and comments regarding the proposed rule from members of the bar, current and  
25 former Superior Court judges, Superior Court presiding judges in a number of Arizona  
26 counties (including Maricopa, Pima, Coconino and Yavapai counties) and the National

1 Center for State Courts.<sup>1</sup> The overwhelming consensus of those responding can be  
2 expressed as follows: As a general rule for assigning cases, random assignment is  
3 desirable and nearly universally practiced in the Superior Court in most counties, but an  
4 inflexible rule requiring random assignment in *all* cases is neither practically possible nor  
5 desirable. Moreover, if a party is dissatisfied with a judicial assignment in a case (either  
6 randomly assigned or specially assigned by the presiding judge), the existing Arizona  
7 rules give the party the right to replace the judge without showing cause. *See, e.g.,* Ariz.  
8 R. Civ. P. 42(f)(1) (civil matters); Ariz. R. Crim. P. 10.2 (criminal matters). The State Bar  
9 believes that these existing rules assure that fairness and the appearance of impartiality are  
10 preserved in judicial assignments in individual cases.<sup>2</sup>

11 The critical flaw in the petition is its failure to identify any actual problem that the  
12 proposed rule would solve. Rather, the State Bar's review of the case assignment systems  
13 in Maricopa County, Pima County and several rural counties does not reveal any  
14 widespread or system problem warranting a change in statewide court administration in all  
15 counties, applicable to all cases, civil and criminal. The State Bar is also concerned that  
16 adopting a "one-size-fits-all" approach to case assignment in Arizona, with its vast  
17 diversity in population, caseloads and judicial resources from county to county, is likely to  
18 create significant problems without conferring a meaningful benefit on litigants or the  
19 public.

#### 20 Current Practice

21 Not surprisingly, the Superior Court in Arizona's two largest counties—Maricopa  
22 County and Pima County—already assign most cases on a nearly random basis. (The  
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24 <sup>1</sup> The written comments of the National Center for State Courts are attached to this  
comment in Exhibit A.

25 <sup>2</sup> The rules also permit parties to request a change of judge for cause, which creates  
26 another protection against perceived bias by a judge assigned to a case. *See, e.g.,* Ariz. R.  
Civ. P. 42(f)(2) (civil matters); Ariz. R. Crim. P. 10.1 (criminal matters).

1 sheer volume of cases in those courts makes any other system nearly impossible to  
2 implement or administer.) Within each department of the Superior Court in those  
3 counties,<sup>3</sup> cases are assigned to judges on a random basis unless recusals,  
4 disqualifications, workload or other factors requiring *ad hoc* treatment exist. Even in the  
5 event of routine recusals or disqualifications of judges (with or without cause), cases are  
6 generally reassigned in a random fashion by court administration.

7         Petitioner points to Pima County as an example where petitioner's goal of complete  
8 random assignment has been implemented pursuant to Pima County Local Rule 6.3.  
9 Based on discussions with Pima County court personnel, however, it appears that  
10 petitioner's interpretation of that Rule does not comport with the way the court interprets  
11 and applies that Rule. The State Bar understands that cases in Pima County are assigned  
12 in a manner nearly identical to the way they are assigned Maricopa County. While  
13 random assignment is the norm, the presiding judge reserves the authority under the Local  
14 Rule to specially assign cases as exigencies warrant.

15         In Arizona's smaller counties, one judge frequently serves as the sole judge for a  
16 department, making random assignment impossible. In such counties, case assignments to  
17 a particular judge are effectively automatic by virtue of their subject matter.  
18 Reassignments in such counties are handled by the presiding judge on a discretionary  
19 basis.

### 20                                 **The Need for Discretion**

21         The need for a presiding judge to have discretion in specially assigning certain  
22 cases arises in a number of circumstances that are too numerous and nuanced to list  
23 comprehensively either in this comment or in any rule that might be proposed. It is easy,  
24 however, to offer several examples that illustrate why preserving such discretion is  
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26         <sup>3</sup> The petition erroneously refers to organizational departments of the court as  
"divisions." "Division" is the term used to refer to an individual judge's chambers, not a  
department of the court.

1 necessary.

2 First, a presiding judge may in certain circumstances need to assign cases on a non-  
3 random basis to ensure that caseloads are equalized among judges and that each case will  
4 receive timely attention. Certain case types, including capital cases and lengthy civil  
5 trials, may require many months of a judge's full attention. If a presiding judge were to  
6 lack the discretion to assign such cases in a manner calculated to equalize workload, the  
7 backlog would quickly become unacceptable as a purely random case assignment system  
8 is likely to result in a single judge being required to handle several such cases  
9 simultaneously.

10 Second, there are certain cases in which *every* Superior Court judge in a given  
11 county is ethically unable to accept a case assignment. Such cases may involve the active  
12 participation of a judge of the court as a litigant or witness, or other factors that lend an  
13 appearance of impropriety if a case were assigned to any sitting judge in the county. In  
14 these circumstances, random assignment is not possible. The presiding judge in such  
15 cases must seek volunteers from courts in other counties or from a pool of retired judges  
16 who serve as judges *pro tempore*. In such cases, it can be difficult to find volunteers and  
17 many potential substitute judges will disqualify themselves before an acceptable  
18 replacement is found.

19 Third, certain case types may engender an abnormal number of recusals of judges  
20 within a department in a given county. In these cases, reassignments within the county  
21 are frequently possible, but are not random, because the presiding judge must defer to the  
22 personal decision of individual judges about disqualification.

23 Fourth, certain cases involving dangerous or vexatious litigants can result in  
24 unfortunate harassment of judges and risks to judicial security. A presiding judge must  
25 carefully exercise discretion in such cases in assigning to specific judges to minimize such  
26 risks.

Though the foregoing examples certainly do not comprise every instance in which special assignment by a presiding judge may be required, they illustrate the impracticability of a rule that would deprive a presiding judge of all discretion to make case assignments and would instead rely exclusively on random case assignment.

## The Arizona Solution

Concerns over case assignments have long been the topic of discussion in Arizona. To that end, the Supreme Court adopted, after much debate, Arizona Rule of Civil Procedure 42(f)(1), Arizona Rule of Criminal Procedure 10.2, and their counterparts in the family law, probate and juvenile court rules. These rules allow a party to disqualify a judge without showing cause, and place Arizona in a small minority of States that allow such a practice. By their nature, these rules prevent pure “randomness” in the ultimate assignment of a judge to a case. Indeed, they provide parties concerned about judicial assignments with the nearly absolute right to “deselect” a given judge. Petitioner has availed himself of the procedures under these rules, as have other litigants.

There is an insurmountable logical tension between these rules and the salutary goals of random assignment. An intellectually honest attempt to achieve randomness cannot be reconciled with the limited judge-shopping that the current rules permit. In effect, the proposed rule amendment would serve more to interfere with a presiding judge's ability to effectively administer the courts in an efficient and fair way than it would to achieve any benefits associated with true random selection.

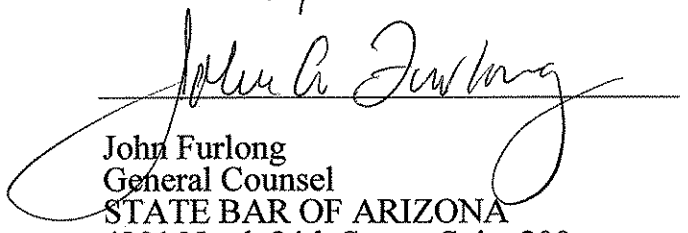
As noted above, the petition does not cite to a single instance of a flawed judicial assignment that requires a statewide rule change. To the extent any concerns with current practice exist, the State Bar believes that rules such as Rule of Civil Procedure 42(f) and Rule of Criminal Procedure 10.2 more than adequately empower parties to address them.

## Conclusion

The State Bar believes that this Court has already implemented sufficient

1 protections against perceived bias in judicial assignments by allowing notices of change of  
2 judge without cause. The State Bar recommends that the Court reject the proposed rule  
3 change because it would solve no existing problem and would make administration of the  
4 Superior Court in Arizona less manageable, efficient and fair.

5  
6 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of April 2009.

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12  
13 Electronic copy filed with the  
Clerk of the Supreme Court of Arizona  
14 this 20<sup>th</sup> day of April 2009.

15 by: Kathleen Lundgren  
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# **Exhibit A**



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# Memo

**To:** Barry Schneider and Bob Myers  
**From:** David C. Steelman  
**CC:** Gordy Griller  
**Date:** January 26, 2009  
**Re:** Maricopa County Attorney's Petition to Amend re: Random Assignment of Judges

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On Friday, January 23, Gordy Griller called me about the petition for a rule amendment on assignment of cases. Then he sent me a copy of the email exchange he'd had with Judge Myers and Mr. Schneider, along with a copy of the petition and a request that comment on the petition. Over the years, I've had an opportunity to address issues of court operations, caseload management and judge assignments in a number of jurisdictions, and I am pleased to offer the thoughts that follow.

**Introduction.** The petition by the Maricopa County Attorney to amend 17A A.R.S. Sup.Ct. Rules, Rule 92(a)(1), would require that the presiding judge of Superior Court in each county "create a randomized case assignment system within each judicial division for all cases in which a judge has not been previously involved, except as otherwise provided by A.R.S. Section 8-202(B)." The petition notes that this rule does not now restrict a presiding judge in individual case assignments, and that the process of assigning new cases to judges is further elaborated by Maricopa County Superior Court Local Rule 4.3(a), which provides that "criminal cases shall be assigned to trial divisions in a manner to be prescribed by the presiding judge providing for as equal a distribution of cases to all divisions as possible." It observes that "the current state of the law in Arizona has insufficient safeguards to prevent actual assignment of a biased judge," potentially giving rise "to an appearance of impropriety on the part of the judiciary."

There is broad and general agreement that the very purposes of courts most prominently include the requirement to do justice in individual cases, as well as the obligation to appear to do justice in individual cases.<sup>4</sup> As the petition suggests, the Superior Court in Maricopa County should therefore take appropriate steps to avoid both bias and the appearance of impropriety. If there is in fact a problem of bias or apparent impropriety in Maricopa County, however, the remedy suggested in the County Attorney's petition – random assignment of all cases, with specific minor exceptions – is not the only possible solution, and it may not be the best solution.

**Accountability and Independence.**<sup>5</sup> Another area in which there is broad agreement is that a

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<sup>4</sup> See Barry Mahoney, et al., *Planning and Conducting a Workshop on Reducing Delay in Felony Cases, Volume One: Guidebook for Trainers* (Williamsburg, VA: National Center for State Courts, 1991), Part 2, Unit P2.

<sup>5</sup> See Bureau of Justice Assistance and National Center for State Courts, *Trial Court Performance*



court must account publicly for its performance and its use of public resources. A possible inference from the County Attorney's petition is that there is insufficient general public accountability for the manner in which case assignments to judges are made by the presiding judge in Maricopa County.

On the other hand, a court must assert and maintain its institutional integrity as a distinct branch of government from such executive branch officials as a local prosecuting attorney. Without specific knowledge of the particular circumstances for the filing of this petition, and without awareness of any indication of actual judicial bias or apparent judicial impropriety, an outside observer might view this petition as a reflection of an effort by the prosecutor's office in Maricopa County to resolve a problem by overcoming resistance from the court leaders who created the problem, and who may refuse to be held accountable.

Yet the outside observer might also see this as a situation in which the prosecutor's office has "gone over the head" of the trial court in Maricopa County, seeking a statewide rule change, not only for criminal cases but for all case types, as a way to solve a local Maricopa County dispute between prosecutor and court about the manner in which the court allocates its resources. Moreover, the local prosecutor in Maricopa County might properly be seen by the outside observer as a powerful local politician, in addition to being an adversarial participant in the local trial court process. Just as a prosecutor would justly resist outside efforts to manipulate the assignment of cases to prosecutors or any other proper exercise of prosecutorial discretion, a trial court should resist outside efforts to undermine court control of case processing or to intrude on the court's responsibility to exercise the use of its own resources.

**Randomization, Times to Disposition, and Calendar Systems in General.** As the Maricopa County Attorney's petition indicates, Supreme Court Rule 92(a)(1) does not now restrict the manner in which the presiding judge in a county has cases assigned. The absence of such a restriction means that a trial court in any given Arizona county might have cases assigned to judges under an "individual calendar" system (in which a single judge has responsibility for all case events from initiation to conclusion), a "master calendar" system (in which judges are assigned to preside over specific court events such as motions, pretrial conferences, or trials, so that more than one judge might be involved in any given case), or a "hybrid" calendar (combining features of individual or master calendars).<sup>6</sup>

Random assignment of cases to specific judges is relevant only in an "individual calendar" system, since a "master calendar" or "hybrid calendar" system necessarily involves having a single judge hear many cases that would subsequently be heard at a later stage by one or more other judges. In the most comprehensive study of the pace of delay in urban trial courts, it was found that having individual calendars tends to be associated with shorter times to disposition for civil cases (although master calendar systems can produce expeditious case processing), but that there is no link between the number of felony cases over one year old in a court and the kind of system the court has for assigning cases to judges.<sup>7</sup>

If prompt justice and speedy trial are important values for courts in Arizona, the Supreme Court should be careful about mandating random assignment (and individual calendars) for all cases. Having cases randomly assigned to individual judges can potentially promote accountability, but it may not do

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*Standards with Commentary* (Monograph NCJ 161570) (Washington, DC: US Department of Justice, 1997), Section 4.

<sup>6</sup> On different systems for assigning cases to judges, see David Steelman, with John Goerd and James McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (Williamsburg, VA: National Center for State Courts, 2004 edition), pp. 111-115.

<sup>7</sup> See John Goerd, Chris Lomvardias and Geoff Gallas, *Reexamining the Pace of Litigation in 39 Urban Trial Courts* (Williamsburg, VA: National Center for State Courts, 1991), pp. 18 and 47.

so in practice.<sup>8</sup> As the national research suggests, amending Rule 92(a)(1) to mandate individual calendars for felony cases would not necessarily promote speedy trials.

**Equal Distribution of Work among Judges.** Providing for case assignments to spread work in a fairly equal manner among judges is a sound and prudent way for a court to use its available resources. It prevents any one judge, as well as the prosecutors and public defenders appearing before him or her, from becoming bogged down with more work than is assigned in other courtrooms.

It is important to distinguish the concept of “caseload” from that of “workload.” It is intuitively obvious that not all “cases” are equal – a homicide case or felony sex offense calls for much more work than a low-level felony burglary or the typical probation violation.<sup>9</sup> Indeed, differences in practice and procedure from one jurisdiction to the next may mean that the amount of time required for the same kind of case may vary from one jurisdiction to another.<sup>10</sup> For this reason, two judges assigned the same number of cases in a given period of time in the same court might have vastly different workloads.<sup>11</sup>

One way to deal with this problem would be to use workload measures instead of case totals to achieve an equal distribution of work. In the absence of such means, however, it is necessary for a presiding judge to make qualitative judgments about the fair distribution of work among judges. Without means for equalizing work, whether through quantitative workload measures or through qualitative judgment, a court and its judges would be severely hampered in any effort to assure that available resources are applied in a sensible fashion to assure prompt and fair resolution of cases. The need for such capacity is multiplied by other foreseeable factors, such as the need to adjust judge assignments in view of illnesses and other absences, the problems and consequences of having one judge committed to a jury trial lasting weeks or even months, or the allocation of cases when a new judge or judicial officer comes on the bench.

**Conclusion.** It is important for the Superior Court in Maricopa County to assure that unbiased justice is done in individual cases and to avoid the appearance of impropriety. As public officials, judges must also be accountable to the public. Yet it is also critical for a court to protect its institutional independence and integrity, and to exercise responsible management of its resources. Such responsible management has to do with assigning cases to judges in a manner that promotes both prompt justice and equal distribution of work among judges. To an outside observer, it does not appear that a statewide mandate that all cases be randomly assigned to individual judges would serve these ends.

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<sup>8</sup> See the example of Trumbull County, Ohio, as reported in Steelman, Goerdts and McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium*, at p. 8, citing a study by Steelman and Lorraine Adams, *Civil Case Scheduling in the Trumbull County (OH) Court of Common Pleas* (North Andover, MA: National Center for State Courts, Northeastern Regional Office, 1982).

<sup>9</sup> See Victor Flango and Brian Ostrom, *Assessing the Need for Judges and Court Support Staff* (Williamsburg, VA: National Center for State Courts, 1996).

<sup>10</sup> See National Center for State Courts, “Comparison of General Jurisdiction Trial-Court Workloads (Expressed as Case Weights in Minutes) from Recent NCSC Workload Studies” (unpublished spreadsheet document in the files of David Steelman).

<sup>11</sup> Because of differences among judges in work practices, and as a means to achieve fair allocation of work among judges in a fast-growing Arizona County, the National Center for State Courts recently completed a workload analysis with the judges of Pinal County to create a workload tool for work allocation among them. See David Steelman, et al., *Superior Court Judicial Workload and Case Management in Pinal County, Arizona* (Denver, CO: National Center for State Courts, Court Consulting Services, October 2008).